SHAWN A. MANGANO, ESQ.
Nevada Bar No. 6730
shawn@manganolaw.com
SHAWN A. MANGANO, LTD.
9960 West Cheyenne Avenue, Suite 170
Las Vegas, Nevada 89129-7701
(702) 304-0432 – telephone
(702) 922-3851 – facsimile

J. CHARLES COONS, ESQ.
Nevada Bar No. 10553
ccoons@righthaven.com
Assistant General Counsel at Righthaven
Righthaven LLC
9960 West Cheyenne Avenue, Suite 210
Las Vegas, Nevada 89129-7701
(702) 527-5900

Attorneys for Plaintiff Righthaven LLC

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RIGHTHAVEN LLC, a Nevada limited-liability company, Plaintiff, v. DANIEL BARHAM, an individual; and URBAN NEIGHBOURHOOD, an entity of unknown origin and nature, Defendants.	Case No.: 2:10-cv-02150-RLH-RJJ **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Righthaven LLC ("Righthaven") hereby opposes Defendant Daniel Barham's ("Defendant") Motion to Dismiss (the "Motion," Doc. # 6). Righthaven's Opposition is based upon the Declaration of Shawn A. Mangano, Esq. ("Mangano Decl."), the pleadings and papers on file in this action, any oral argument this Court may allow, and any other matter of which this Court takes notice.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant, who is appearing without the benefit of counsel, advances several novel arguments as to why Righthaven's Complaint should be dismissed. First, Defendant claims that Righthaven somehow lacks standing to bring an infringement action for his 100% unauthorized replication of a visual work because the application materials attached to the motion reference author created "text." Defendant extrapolates from this "text" reference that Righthaven lacks standing to bring this action for infringement based on his unauthorized reproduction of a visual illustration accompanying the text of the article. Defendant's standing argument has absolutely no merit in view of the registration issued by the Untied States Copyright Office ("USCO"), which clearly covers the "visual material" that Defendant copied without authorization. (Mangano Decl. Ex. A.)

Defendant next takes the equally novel approach that the Court should dismiss Righthaven's Complaint based on yet to be alleged affirmative defenses of fair use, implied license and unclean hands. (Doc. # 6 at 4-11.) Defendant, who has not asserted these affirmative defenses in an answer to the Complaint, request dismissal under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), which limits the Court's inquiry to the allegations contained in the Complaint. As such, dismissal under Rule 12(b)(6) on these affirmative defenses is wholly inappropriate.

Moreover, as noted by the Court (Doc. # 7), while conversion of Defendant's Motion from one seeking relief under Rule 12(b)(6) to one seeking relief under Federal Rule of Civil Procedure 56 ("Rule 56") may cure this procedural error by considering the materials submitted which fall outside of the Complaint, Defendant's reliance on his yet to be plead affirmative defenses cannot be the basis for granting the requested relief due to his failure to provide any competent evidence upon which can properly be relied under a Rule 56 analysis. Moreover, Defendant's reliance on the affirmative defenses of fair use, implied license and unclean hands raise numerous genuine issues of material fact. The existence of these genuine issues of material fact preclude entry of summary judgment under Rule 56 – particularly in a case where Defendant is exclusively in possession of information and knowledge upon which discovery has yet to be conducted and upon which this Court must rely to grant the relief requested.

II. FACTS

Righthaven is the owner of the copyrighted visual work entitled: "Vdara death-ray" (the "Work"). (Doc. # 1 ¶ 9, Ex. 1; Mangano Decl. Ex. A.) The Work was originally published on September 25, 2010 in the Las Vegas *Review-Journal* ("LVRJ"). (Doc. # 1 ¶ ¶ 10-12.) The Work clearly identifies the LVRJ as the original source publication. (*Id.* ¶ 12, Ex. 1.) Substantively, the Work visually depicts the reflection of sunlight from the Vdara tower on to the pool area at the hotel. (*Id.* Ex. 1.)

Defendant is alleged to be the current registrar, registrant, administrative contact and technical contact of the Internet domain found at <urbanneighbourhood.com> (the "Domain"). (Doc. # 1 ¶ 6.) Urban Neighbourhood is, and has been at all times relevant to this lawsuit, the self-proclaimed owner of the copyright(s) in the work(s) posted as part of the content accessible through the Domain, as evidenced by a copyright notice displayed on the website found at www.urbanneighbourhood.com (the "Website"): "Copyright © Urban Neighbourhood". (*Id.* ¶ 7.) On or about October 2, 2010, Defendant posted, without authorization, a 100% copy of the Work on the Website, which serves as the basis for Righthaven's copyright infringement claims in this action (the "Infringement"). (*Id.* ¶¶ 12, 21-40, Ex. 2.) Defendant admits he posted the unauthorized, 100% visual copy of the Work on the Website. (Doc. # 6 at 1-2.)

Defendant asks this Court to dismiss Righthaven's Complaint pursuant to Rule 12(b)(6) for lack of standing due to the application materials containing a reference to "text" as the nature of the Work at-issue in view of his admitted replication of the visual image of the Work. As set forth below, Defendant's argument must be rejected because the registration for the Work issued by the USCO clearly states that it is for "Visual Material." (Mangano Decl. Ex. A.) Defendant additionally seeks to gain dismissal of the Complaint based on application of several affirmative defenses, such as fair use, implied license and unclean hands which are not properly before the Court since no answer has been filed. Moreover, to the extent the Court converts the Motion to a request for summary judgment under Rule 56(a) (*see* Doc. # 7), denial is compelled in view of the complete lack of admissible evidence submitted in support of Defendant's fair use, implied license and unclean hands affirmative defenses. This absence of admissible evidence precludes entry of summary judgment in Defendant's favor under Rule 56. Moreover, the affirmative defenses asserted by Defendant raise numerous genuine issues of material fact, which further precludes entry of summary judgment under Rule 56. Accordingly, under either a Rule 12(b)(6) or a Rule 56 analysis, the Motion must be denied.

III. APPLICABLE STANDARDS

A. *Rule 12(b)(6) Standards.*

With regard to Defendant's request for dismissal pursuant to Rule 12(b)(6), such a motion "is viewed with disfavor and is rarely granted." *See Gilligan v. Jamco Dev. Corp,* 108 F.3d 256, 249 (9th Cir. 1997) (internal quotations marks omitted). Dismissal pursuant to Rule 12(b)(6) is only appropriate in extraordinary cases. *United States v. Redwood City,* 640 F.2d 963, 966 (9th Cir. 1981); *Cauchi v. Brown,* 51 F.Supp.2d 1014, 1016 (E.D. Cal. 1999); *United States v. White,* 893 F.Supp. 1423, 1428 (C.D. Cal. 1995). The "court's role at the 12(b)(6) stage is not to decide winners and losers or evaluate the strength or weakness of claims . . . ." *Jacobson v. Hughes Aircraft Co.,* 105 F.3d 1288, 1292 (9th Cir. 1997). Thus, courts do not consider whether the plaintiff will ultimately prevail under Rule 12(b)(6), but only whether the plaintiff is entitled to offer evidence in support of the claims alleged. *Allison v. California Adult Auth.,* 419 F.2d 822, 823 (9th Cir. 1969). In fact, dismissal is only "appropriate when it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the complaint." *See Burnett v. Twentieth Century Fox Film Corp.,* 491 F.Supp.2d 962, 966 (C.D. Cal. 2007). All allegations asserted in the complaint must be construed in favor of the non-moving party and all material allegations – including any reasonable inferences drawn from same – must be accepted as true by the Court under a Rule 12(b)(6) analysis. *See id.* Where dismissal is granted, leave to amend should be granted unless doing so is futile. *In re Silicon Graphics, Inc. Sec. Litig.,* 183 F.3d 970, 991 (9th Cir. 1999).

B. *Rule 56 Standards.*

The Court is prohibited from considering material outside the complaint under Rule 12(b)(6) unless it converts the motion into one seeking summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 925 (9th Cir. 2001); *Beliveau v. Caras,* 873 F.Supp. 1393, 1395 (C.D. Cal. 1995). Such a conversion is generally disfavored if "(1) the motion comes quickly after the complaint was filed, (2) discovery is in its infancy and the nonmovant is limited in obtaining and submitting evidence to counter the motion, or (3) the nonmovant does not have reasonable notice that a conversion might occur." *Rubert-Torres v. Hospital San Pablo, Inc.,* 205 F.3d 472, 475 (1st Cir. 2000). Notice in this regard has been interpreted to require at least ten (10) days notice. *See In re Rothery,* 143 F.3d 546, 549 (9th Cir. 1998); *see also Mack v. South Bay Beer Distrib., Inc.* 798 F.2d 1279, 1282 (9th Cir. 1986).

Entry of summary judgment is only proper where "the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986). This burden is only discharged through the submission of admissible evidence in support of the claimed basis for relief. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986); *see also Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir. 1990). As required on a motion for summary judgment, the facts are construed "in the light most favorable to the party opposing the motion." *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Moreover, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson,* 477 U.S. at 249. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Id.* at 256.

Rule 56 must be construed "with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury."

Celotex Corp., 477 U.S. at 327. Summary judgment is proper only after there is an adequate opportunity for discovery. *Id.* at 326. This is particularly true when evidence is presented by a moving party in support of summary judgment on matters exclusively within their possession or based on their knowledge and there has not been an adequate opportunity to conduct discovery on those matters. *See Anderson,* 477 U.S. at 257. In fact, "where the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted as a matter of course." *International Raw Materials, Ltd. v. Stauffer Chem. Co.,* 898 F.2d 946, 949 (3d 1990)(internal quotation marks omitted).

Application of the foregoing standards in view of the record before the Court demonstrates that Defendant's Motion must be denied. His lack of standing attack is completely without merit given the contents of the registration for the Work from the USCO. Furthermore, dismissal under Rule 12(b)(6) is inappropriate based on his claims that Righthaven's Complaint is barred by the affirmative defenses of fair use, implied license and unclean hands, which have not been placed at-issue through an answer. Moreover, dismissal under Rule 56 is equally inappropriate given the host of genuine issues of material fact raised by Defendant's attempted reliance on these unasserted affirmative defenses.

IV. ARGUMENT

A. *Defendant's Rule 12(b)(6) Attack Must be Denied.*

Defendant seeks dismissal of Righthaven's Complaint under Rule 12(b)(6). In doing so, Defendant first moves for dismissal of Righthaven's Complaint based on an alleged lack of standing to assert infringement of the unauthorized, visual reproduction of the Work. As set forth below, Defendant's argument in this regard is rendered meritless in view of the USCO's registration granted to Righthaven for the "Visual Material" of the Work. (Mangano Decl. Ex. A.)

Defendant next seeks dismissal of Righthaven's Complaint under Rule 12(b)(6) based on the affirmative defenses of fair use, implied license and unclean hands. These affirmative defenses fall outside of Righthaven's Complaint and have yet to be formally alleged in this case via an answer. Accordingly, Defendants' request for dismissal under Rule 12(b)(6) must be denied.

1. Defendant's Misplaced Standing Argument Fails in View of The USCO Registration of "Visual Material" For The Work.

Upon review of Defendant's dismissal request under Rule 12(b)(6) for lack of standing, it becomes readily apparent that he is misconstrued the nature of the Work and Righthaven's associated application for same. In short, Defendant asserts that Righthaven lacks standing because the company's application for registration lists the author created work as being "text" and it has sued for the unauthorized replication of the visual depiction of the "Vdara death-ray." (Doc. # 6 at 2-3.) Defendant's argument, however, must be rejected in view of the USCO's registration for the Work, which clearly states Righthaven has been granted rights in and to the "Visual Material" contained in the Work. (Mangano Decl. Ex. A.) Moreover, a Form VA Copyright Registration is for graphic and pictorial materials, such as the Work. (*Id.* Ex. B.) Accordingly, Defendant's contention that Righthaven somehow lacks standing to bring its infringement claim is without merit and must be rejected by the Court.

2. Righthaven is Not Required to Plead Facts to Negate Anticipated Affirmative Defenses That Have Not Been Asserted by Defendants in an Answer to The Complaint to Survive Dismissal Under Rule 12(b)(6).

Defendant next seeks to impose upon Righthaven a requirement to somehow anticipate and plead around three affirmative defenses - fair use, implied license, and unclean hands- that are not before the Court by way of an answer to the Complaint or face dismissal of its claims under Rule 12(b)(6). This is nonsense.

The "court's role at the 12(b)(6) stage is not to decide winners and losers or evaluate the strength or weakness of claims . . . ." *Jacobson,* 105 F.3d at 1292. Thus, courts do not consider whether the plaintiff will ultimately prevail under Rule 12(b)(6), but only whether the plaintiff is entitled to offer evidence in support of the claims alleged. *Allison,* 419 F.2d at 823. Fair use is an affirmative defense upon which the defendant bears the burden of proof with respect to all issues in dispute as to whether a particular use of copyrighted material qualifies for the defense.

See Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1158 (9th Cir. 2007); *accord Lindal Cedar Homes, Inc. v. Ireland,* Civ.03-6102-TC, 2004 WL 2066742, at *5 (D. Or. Sept. 14, 2004). The fair use doctrine requires a "case-by-case analysis." *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 577 (1994). Courts are required to consider and weigh all four factors when conducting a fair use analysis. *Id.* Likewise, implied license is also an affirmative defense upon which the defending party bears the burden of proof. *A&M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1026 (9th Cir. 2001). Similarly, unclean hands is also an affirmative defense upon which the defending party bears the burden of proof. *See Coca-Cola Co. v. Overland, Inc.,* 692 F.2d 1250, 1257 (9th Cir. 1982).

Here, Defendant asks the Court to dismiss Righthaven's Complaint based on the affirmative defenses of fair use, implied license and/or unclean hands without having placed those defenses at-issue in this case via an answer to the Complaint. Rather, Defendant asks the Court to grant him dismissal based on a pre-answer Rule 12(b)(6) request and before any discovery has occurred. Such relief is completely inappropriate under a Rule 12(b)(6) analysis because the Court's inquiry is limited to the allegations contained in the Complaint. *See Allison,* 419 F.2d at 823. Accordingly, Defendant's request for dismissal based on the affirmative defenses of fair use, implied license and/or unclean hands is wholly inappropriate under Rule 12(b)(6). Accordingly, Defendant's request for dismissal under Rule 12(b)(6) as to these affirmative defenses must be denied.

B. *The Court's Conversion of Defendant's Motion Into a Request For Dismissal Under Rule 56 Requires Denial as it Lacks Any Evidentiary Merit And it Raises Numerous Genuine Issues of Material Fact Are Raised.*

By Minute Order, the Court indicated that it would convert Defendant's Motion into a request for summary judgment given the submission of and consideration of materials outside of the Complaint. (Doc. # 7.) Converting Defendant's Motion to one for summary judgment, however, requires denying the relief requested because it is devoid of any evidentiary merit and numerous genuine issues of material fact are raised through the affirmative defenses of fair use, implied license and unclean hands.

1. Defendant's Motion is Devoid of Competent Evidence Upon Which This Court Could Grant Summary Judgment Under Rule 56.

By converting Defendant's Motion into a request for summary judgment, the Court must employ the evidentiary standards for admissibility required under Rule 56. As Defendant's Motion is devoid of any competent and admissible evidence as to the affirmative defenses of fair use, implied license and unclean hands, it must be denied.

In order to grant summary judgment, the facts relied upon must be admissible under the Federal Rules of Evidence. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.,* 896 F.2d 1542, 1555 (9th Cir. 1989). Factual assertions may be contained in declarations or affidavits sworn under penalty of perjury. *See LeBoeuf, Lamb, Greene & McRae, LLP v. Worsham,* 185 F.3d 61, 65-66 (2d Cir. 1999). Moreover, a party can only competently testify, by declaration, affidavit or in-person, with regard to matters within his personal knowledge and that would otherwise be admissible under the Federal Rules of Evidence. *See Orr v. Bank of America, NT & SA,* 285 F.3d 764, 778 (9th Cir. 2002); *Bank Melli v. Pahlavi,* 58 F.3d 1406, 1412 (9th Cir. 1995).

Here, Defendant has advanced a host of factual assertions concerning the affirmative defenses of fair use, implied license, and unclean hands without the evidentiary support required to do so under Rule 56. For instance, Defendant discusses his allegedly "transformative" actions at-length without any evidentiary support upon which this Court can rely. (*See* Doc. # 6 at 6.) Defendant likewise argues about the nature of the Website, its not-for-profit use, lack of income derived from same and its lack of any paid advertisements without submitting this in any form upon which could be construed as admissible or ripe for consideration under Rule 56 by this Court. (*Id.* at 1.) Similarly, Defendant argues he "did not profit from advertising on his website where the copied materials were displayed . . . ." (*Id.* at 9.) Again, this assertion is without any evidentiary support or other indicia of admissibility. Defendant's fair use discussion additionally asserts his apparent intent, without the benefit of any admissible evidence, by stating "[t]he material was placed into the Post primarily to bring attention to the general public regarding the foolhardy nature of ignoring natural phenomenon when designing a building." (*Id.*) The Court simply cannot find in favor of the Defendant as to his fair use analysis in view of the multitude of factually unsubstantiated and inadmissible statements contained in the Motion under a Rule 56 analysis.

The same result is compelled with regard to Defendant's implied license argument. Defendant's argument in this regard is limited to the submission of materials apparently displaying the means through which the source publication permits users to share material. (Doc. # 6 at 10.) Defendant's evidence in this regard is wholly lacking in evidentiary merit and is devoid of any substantive, admissible evidence upon which this Court could find in his fair as to the affirmative defense of implied license under a Rule 56 analysis. For instance, Defendant has failed to authenticate the materials presented to the Court. Furthermore, even if such evidence were somehow deemed admissible, the Defendant simply presents the Court with the various options for sharing information from the source publication's website, without presenting it with any evidence as to the form in which this information is conveyed between a viewer and a recipient under any one of these options.

Likewise, Defendant's unclean hands affirmative defense is completely devoid of any evidentiary support upon which this Court could enter summary judgment in his favor under a Rule 56 analysis. In this regard, Defendant sets forth some 14 lines of argument without reference to even a scintilla of admissible evidence. (*See* Doc. # 6 at 11-12.) Moreover, the statements asserted by Defendant are clearly speculative in that they cover subjects upon which he cannot possibly have personal knowledge. For instance, Defendant asks this Court to accept the premise that Righthaven "likely purchased the copyright with the specific intention of pursing this action against Mr. Barham and a number of other bloggers." (*Id.* at 11.) This statement is incapable of meeting the personal knowledge threshold required for admissibility absent a finding that Defendant is clairvoyant. Defendant's ramblings in this regard next traverses to "Righthaven's motivation . . ." for failing to send out cease and desist letters. (*Id.* at 12.) While such speculative rants may be appropriate for opinion or editorial literary pieces, they cannot serve as the basis for entry of summary judgment under Rule 56.

2. *Defendant's Assertion of The Fair Use Defense Raises Numerous Genuine Issues of Material Fact.*

The Court must deny Defendant's request for dismissal under Rule 56 with regard to the affirmative defense of fair use. Defendant has failed to come forth with any competent evidence in support of this defense. Moreover, resolution of the merits of this affirmative defense necessarily raises numerous genuine issues of material fact.

"In ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson,* 477 U.S. at 254. In this regard, fair use is an affirmative defense upon which the defendant bears the burden of proof with respect to all issues in dispute as to whether a particular use of copyrighted material qualifies for the defense. *See Perfect 10, Inc.,* 508 F.3d at 1158; *accord Lindal Cedar Homes, Inc.,* 2004 WL 2066742, at *5. As explained by the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit"):

> "Fair use is a mixed question of law and fact. If there are no genuine issues of material fact, or if, even after resolving all issues in favor of the opposing party, a reasonable trier of fact can reach only one conclusion, a court may conclude as a matter of law whether the challenged use qualifies as a fair use of the copyrighted work."

Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1120 (9th Cir. 1997)(quoting *Hustler Magazine, Inc. v. Moral Majority, Inc.,* 796 F.2d 1148, 1150 (9th Cir. 1986)).

Further complicating entry of summary judgment in fair use cases is that the Court's inquiry is not controlled by a bright line test. Specifically, when a copyright defendant asserts the affirmative defense of fair use, the district court must consider the following factors: "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect of the use upon the potential market for the work or the value of the work." *A&M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1014 (9th Cir. 2001) (internal quotation marks omitted); *see also* 17 U.S.C. § 107. The fair use doctrine requires a "case-by-case analysis." *Campbell,* 510 U.S. at 577.

Courts are required to consider and weigh all four factors when conducting a fair use analysis. *Id.* Conducting such an analysis as a matter of law requires that controlling facts be presumed or admitted. *See Fisher v. Dees,* 794 F.2d 432, 435-36 (9th Cir. 1986).

Here, even if the Court were to disregard the lack of evidentiary support for his arguments, Defendant's fair use analysis necessarily raises genuine issues of material fact that preclude entry of summary judgment. For instance, under the first fair use factor, while Defendant argues that his unauthorized use of the Work was "transformative," Righthaven maintains that it was clearly not given the fact that he replicated the entirety of the graphic image at-issue. (Doc. # 6 at 5-6.) In fact, Defendant's 100% replication of the Work supports a finding against fair use. The law is venerable that the verbatim copying of a protected work greatly reduces the likelihood of fair use. *Los Angeles Time v. Free Republic,* No. 98-7840, 1999 WL 33644483, at *10 (C.D. Cal. Nov. 8, 1999) ("There is nothing transformative about copying the entirety or portions of a work verbatim.") ("*Free Republic I")*; *Campbell,* 510 U.S. at 587-88 (whether "a substantial portion of the infringing work was copied verbatim from the copyrighted work is a relevant question . . . for it may reveal a dearth of transformative character or purpose under the first factor . . ."); *Walt Disney Productions v. Air Pirates,* 581 F.2d 751, 757 (9th Cir. 1978) (acknowledging that "near-verbatim copying" generally precludes a finding of fair use); *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.,* 166 F.3d 65, 72 (2d Cir. 1999) (the first factor weighs strongly against fair use where infringing news abstracts were "for the most part direct translations of Nikkei articles . . .").

Defendant additionally discusses his aggregation of information and his 100% replication of the Work as being "transformative" because it was used with "other information and images from other sources and his own opinions regarding the actions of the people involved in the construction of the Vdara Hotel . . ." (*Id.* at 6.) Defendant cites absolutely no case law, nor is Righthaven aware of any case law, which supports the proposition that use of other potentially copyrighted information along with the 100% replication of a graphic illustration of the copyrighted work sought to be enforced through an infringement action somehow favors a finding of fair use. Thus, at best, genuine issues of material fact are raised under the first fair use factor that preclude entry of summary judgment under Rule 56.

As to the second fair use factor, Defendant advances comprehensible argument as to why the nature of the copyrighted work is not entitled to protection beyond alluding to its factual nature. To begin with, Righthaven has sued Defendant for his unauthorized use of a graphic illustration. As such, this case is distinguishable from other Righthaven actions involving the unauthorized replication of news articles. The graphic illustration at-issue in this case unquestionably involves the creative endeavors of the artist illustrated the Work. This conclusion is supported by Defendant's wholesale copying of the Work. If the same goal could have been accomplished so easily due to the factual information illustrated by the Work, then Defendant could have made his own illustration without having to misappropriate the copyrighted material upon which Righthaven's infringement claim is based. Accordingly, there is simply no basis upon which the Court could conclude Defendant's conduct weighs in favor of fair use under the second factor of its analysis. Again, at best, Defendant's conduct gives rise to genuine issues of material fact that preclude entry of summary judgment as to the second fair use factor.

As to the third factor, which considers the amount of copyrighted work used, Defendant's 100% replication of the Work weighs against a finding of fair use. In this regard, Defendant attempts to mitigate his 100% replication of the Work by including the amount of material quoted from the source publication to determine that he only copied 30% of the article. (Doc. # 6 at 8-9.) This is not what is at-issue in this case. Defendant copied 100% of the Work – and not a percentage less than 100% of the Work. As recognized by the Ninth Circuit, the copying of an entire work militates against a finding of fair use. *See Worldwide Church of God v. Philadelphia Church of God, Inc.,* 227 F.3d 1110, 1118 (9th Cir. 2000)("*Worldwide Church*"); *accord Hustler Magazine, Inc.,* 796 F.2d at 1155. As stated by the panel in *Worldwide Church*, "[w]e have found no published case holding that fair use protected the verbatim copying, without criticism, of a written work in its entirety." 227 F.3d at 1120. While Righthaven maintains that the third factor weighs against a finding of fair use, at a minimum genuine issues of material fact are raised through Defendant's admitted unauthorized replication of 30% of the article in view of Righthaven's contention that he misappropriated 100% of the Work.

As to the fourth factor, which considers the effect upon the potential market for the copyrighted work, Defendant argues exhaustively about his non-commercial use of the Work. The immateriality of Defendant's assertions aside, sufficient evidence exists to find in favor of Righthaven as to the fourth fair use factor. First, as opposed to a transformative work, "a work that merely supplants or supersedes another is likely to cause a substantially adverse impact on the potential market of the original." *Sony Computer Entm't, Inc. v. Connectix Corp.,* 203 F.3d 596, 607 (9th Cir. 2000). The law is clear that "a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling the demand for the original." *Campbell,* 510 U.S. at 587-88. In the *Campbell* decision, the Supreme Court explained that whether a work is copied verbatim is a relevant inquiry under the fourth fair use factor, as this may reveal "a greater likelihood of market harm . . ." *Id.* at 587. "[W]here the [defendant's] use is for the same intrinsic purpose as the copyright holder's . . . *such use seriously weakens a claimed fair use.*" *Worldwide Church,* 227 F.3d at 1117 (emphasis added) (*quoting Weissmann v. Freeman,* 868 F.2d 1313, 1324 (2d Cir. 1989)).

Here, the Defendant cannot escape the fact that he engaged in the cyberspace equivalent of making a Xerox copy of the Work and then used the Xerox copy to advance his own interests. Defendant did nothing to alter the visual depiction of the Work. (Doc. # 1, Ex. 2.) Stated differently, Defendant's unauthorized republication of the Work was entirely lacking in even a scintilla of transformational content or qualities. Such circumstances warrant the conclusion that Defendant's infringing conduct has likely caused a substantial impairment on the potential market for the Work and that Defendants' infringing copy of the Work fulfilled the demand for the original. *See Campbell,* 510 U.S. at 587-88; *Sony Computer Entm't, Inc.,* 203 F.3d at 607.

Additionally, the Court's analysis of the fourth fair use factor must consider "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original." *See Campbell,* 510 U.S. at 590 (internal quotation marks omitted). In this regard, the appropriate inquiry "must take account not only of harm to the original but also of harm to the market for derivative works." *Id.* *(quoting Harper & Row Publishing, Inc.,* 471 U.S. at 568).[1] Such reasoning, when applied to the instant case, clearly reflects the presence of potential market harm.

If numerous, additional Internet users were to replicate the Defendant's wholesale, cyberspace Xerox copy of the Work, the market for both the Work and derivatives of the Work would be inevitably diminished regardless of the intentions of each individual infringer. The Ninth Circuit has held that the fourth fair use factor is not limited to market impairment; this analysis also includes "the effect of the use on the *value* of the copyrighted work." *Worldwide Church of God,* 227 F.3d at 1119 *(quoting* 17 U.S.C. § 107(4)) (emphasis in original). Thus, "even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have . . . [t]hose rewards need not be limited to monetary rewards; compensation may take a variety of forms." *Id. (quoting Sony Corp.,* 464 U.S. at 450).

The potential reduction of a literary work's present and future market value resulting from Internet-based copyright infringement is exemplified by the district court's holding in *Free Republic II.* In *Free Republic II*, the defendants asserted a fair use defense to justify the posting of the plaintiff's newspaper articles on the defendants' website. *Free Republic II,* 54 U.S.P.Q.2d at 1455-59. In finding against fair use, the United States District Court for the Central District of California explained that "[d]efendants use 'substitutes' for the originals, and has the potential of lessening the frequency with which individuals visit plaintiffs' websites, of diminishing the market for the sale of archived articles, and decreasing the interest in licensing the articles." *Id.* at 1471.

The reasoning employed by the court in *Free Republic II* should be applied by this Court. As the Defendant's infringing conduct arguably substitutes for and supersedes the purpose of the original Work given that it consists of a 100% replication of the Work, it takes very little, if any, leap in deductive reasoning to conclude that readers of the Work on Defendant's Website may be diverted from, or elect not to read, the Work's original source publication. Stated differently,

[1] Similarly, in this analysis, "[a]ctual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage." *Sony Corp.,* 464 U.S. at 451.

there is simply no intuitive motivation for someone reading the wholesale, 100% replication of the Work on posted by Defendant to the Website to seek out and read the original version of the Work in any format – such as an Internet website copy or a hard copy. Simply put, the reader has digested the content and is in all likelihood through with the Work, thereby depriving the source publication of other tangible and intangible benefits of increased readership, viewership and/or subscribership. These virtually required logical inferences in view of Defendant's infringing conduct clearly support a finding of diminished value of the Work and of derivatively associated literary works available from the source publication. Such a finding weighs against fair use under factor four of the Court's analysis. At a minimum, the four fair use factor raises genuine issues of material fact that preclude entry of summary judgment.

3. Defendant's Assertion of Implied License Raises Numerous Genuine Issues of Material Fact.

The Court must deny Defendant's request for dismissal under Rule 56 with regard to the affirmative defense of implied license because resolution of the merits of this affirmative defense necessarily raises numerous genuine issues of material fact.

To begin with, the Defendant is apparently contending that because the source publication permits the sharing of content from its website, this amounts to an implied license. (Doc. # 6 at 10-11.) The Defendant is clearly missing the point here. While the Work was certainly made freely available for ***viewing*** via the LVRJ website, the Work was not made freely available in order to permit third parties to ***republish*** it for their benefit. An extension of the Defendant's logic would mean that anyone would be free to set up a competitive Internet news site, stock said site full of content published by the LVRJ, yet escape liability for infringement by claiming that the LVRJ permitted this infringing practice.

Furthermore, the fact that copyrightable material is often published, and thus, ***made available to the public***, is not a new concept. Apparently, the Defendant is unaware that the USCO requires copyright registrants to deposit a specimen of each work with the Copyright Office "for the use or disposition of the Library of Congress." *See* 17 U.S.C. § 407(b). Once registered, each protected work deposited with the USCO enters the Library of Congress and is made accessible to the public. *See id.* However, the fact that a protected work is made publicly available does not mean that the work can be freely copied and distributed amongst the public without repercussion. In effect, the Defendant is arguing that he reasonably assumed that the infringed Work could be copied and publicly distributed simply because it was made available on the LVRJ website. This proposition is highly illogical and essentially ignores hundreds of years of established copyright law.

The Defendant further supports his implied license argument by pointing out that the LVRJ "encouraged people to share the article with others without restrictions." (Doc. # 6 at 10.) However, this statement is patently false. By stating that the LVRJ website encouraged users to share its articles "without restrictions," the Defendant conveniently ignores the fact that the LVRJ website only permits users to save a **hyperlink** leading to the articles published on the LVRJ website, or to e-mail a **hyperlink** leading to the LVRJ website. Importantly, both of these options ultimately require the user (or the user's e-mail recipient) to access the LVRJ articles directly through the LVRJ website. In other words, the option to save or e-mail a hyperlink to the LVRJ articles rightfully ensures that Internet users will only view said articles as they are displayed by the LVRJ website, rather than by viewing unauthorized copies of the articles displayed on an infringing website. This use of hyperlinks, prudently employed by the LVRJ website, is seemingly intended to both ensure copyright protection and invite user traffic to view LVRJ articles online. As such, the Defendant cannot reasonably argue that he properly inferred the LVRJ's consent to wholesale reproduce the Work. By no means are the LVRJ's use of hyperlinks intended to encourage users to commit copyright infringement without any possible repercussion, and the Defendant's contention to the contrary is entirely unreasonable. At a minimum, the LVRJ's use of hyperlinks and its alleged consent to replicate, without authorization its material, raises a genuine issue of material fact that precludes entry of summary judgment on Defendant's implied license argument.

4. Defendant's Assertion of Unclean Hands Raises Numerous Genuine Issues of Material Fact.

The Court must deny Defendant's request for dismissal under Rule 56 with regard to the affirmative defense of unclean hands raises numerous genuine issues of material fact.

As argued above, Defendant's unclean hands affirmative defense is replete with speculative assertions and unwarranted contentions regarding Righthaven's motivation and conduct in filing suit against him. Righthaven's evidentiary objections aside, Defendant's unclean hands argument is completely nonsensical. In essence, Defendant is asserting that because he was caught misappropriating copyrightable material, and Righthaven obtained the right to the copyright in and for the Work in order to file suit against him, that conduct amounts to unclean hands. Quite frankly, Defendant's arguments only serve to illustrate that he is the one with unclean hands having been caught in the proverbial act of taking a cookie from the cookie jar without permission. Defendant's acts of intellectual and cyberspace theft are precisely the purpose for commencing infringement actions such as this case. To the extent the Court believes there is any possible merit to Defendant's unsupported unclean hands allegations, Righthaven maintains that at a minimum Defendant's arguments in this regard raise genuine issues of material fact as to its intent and Defendant's intent. Accordingly, summary judgment cannot be entered as to Defendant's unclean hands defense under Rule 56.

V. CONCLUSION

For the reasons set forth above, Righthaven respectfully requests that this Court deny the Defendant's Motion to Dismiss in its entirety.

Dated this 25th day of January, 2011.

SHAWN A. MANGANO, LTD.

By: /s/ Shawn A. Mangano

SHAWN A. MANGANO, ESQ.
Nevada Bar No. 6730
shawn@manganolaw.com
9960 West Cheyenne Avenue, Suite 170
Las Vegas, Nevada 89129-7701
Tel: (702) 304-0432
Fax: (702) 922-3851

J. CHARLES COONS, ESQ.
Nevada Bar No. 10553
ccoons@righthaven.com
Assistant General Counsel at Righthaven LLC
Righthaven LLC
9960 West Cheyenne Avenue, Suite 210
Las Vegas, Nevada 89129-7701
(702) 527-5900

Attorneys for Plaintiff Righthaven LLC

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that on this 25th day of January, 2011, I caused the **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** along with all supporting documents to be served by the Court's CM/ECF system.

SHAWN A. MANGANO, LTD.

By: /s/ Shawn A. Mangano